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In the Supreme Court of the United States

OCTOBER TERM, 1989

PATRICIA M. WOOD, ET AL., PETITIONERS

v.

GENERAL MOTORS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

DOUGLAS N. LETTER
JOHN F. DALY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

PHILLIP D. BRADY
General Counsel

STEPHEN P. WOOD
Acting Chief Counsel

KENNETH N. WEINSTEIN
Assistant Chief Counsel
National Highway Traffic Safety Administration
Department of Transportation
Washington, D.C. 20590

27pp

QUESTION PRESENTED

Whether Section 103(d) of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1392(d), or Federal Motor Vehicle Safety Standard 208 preempts a state common law design defect tort action based on the failure to install an airbag in a motor vehicle.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

1. In 1966 Congress enacted the National Traffic and Motor Vehicle Safety Act (the Safety Act or Act), 15 U.S.C. 1381, for the purpose of "reducing traffic accidents and deaths and injuries to persons resulting from traffic accidents." To accomplish that goal, the Act directs the Secretary of Transportation [1] to promulgate federal motor vehicle safety standards, 15 U.S.C. 1392(a), which are defined as "minimum standard[s] for motor vehicle, or motor vehicle equipment performance," 15 U.S.C. 1391(2), and prohibits the manufacture, sale, or delivery into interstate commerce of any motor vehicle that does

[1] The Secretary has delegated most of his authority under the Safety Act to the Administrator of the National Highway Traffic Safey Administration (NHTSA). See 49 C.F.R. 1.50(a).

not comply with those standards, 15 U.S.C. 1397.[2] Each standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. 1392(a). The Secretary must consider whether a proposed standard "is reasonable, practicable and appropriate" for the particular type of motor vehicle and "the extent to which such standards will contribute to carrying out the purposes" of the Act. 15 U.S.C. 1392(f)(3) and (4).

The question presented by this case involves the effect on state tort law of one vehicle safety standard, Federal Motor Vehicle Safety Standard (FMVSS) 208. The current version of FMVSS 208 was issued in 1984 after nearly 15 years of analysis, rulemaking, and litigation. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34-38 (1983); *State Farm Mut. Auto. Ins. Co.* v. *Dole*, 802 F.2d 474, 477-478 (D.C. Cir. 1986) (chronicling the development of FMVSS 208), cert. denied, 480 U.S. 951 (1987). FMVSS 208 now requires (with certain exceptions not relevant here) installation in the front seats of all new passenger cars "passive occupant restraint systems," *i.e.*, devices that are intended to help protect occupants from injury during a collision and that do not require any action on the occupant's part other than that necessary to operate the vehicle. The rule gives auto makers the option of installing automatic seat belts or airbags, and also allows them to develop other technologies to satisfy the passive protection requirements, such as passive interiors, although no

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[2] The Safety Act imposes stiff penalties on manufacturers that do not comply with the Secretary's standards. A manufacturer is subject to a $1,000 civil fine by the Secretary for each vehicle not in compliance (subject to a $800,000 cap for any related series of violations), 15 U.S.C. 1398(a), and the Secretary may bring suit to enjoin the sale or distribution of such vehicles, 15 U.S.C. 1399(a). Manufacturers (or distributors) also must repurchase such vehicles, or modify or replace them at their own expense. 15 U.S.C. 1400(a), 1414(a). Moreover, the States can adopt their own enforcement mechanisms for noncomplying vehicles. 15 U.S.C. 1392(d).

such technology has been developed at this time.[3] The 1984 rule phased in its requirements over a four-year period beginning in 1986.[4] Inadopting this rule, Secretary Dole considered and rejected a proposal that would have required all motor vehicles to have an airbag protection system, see pp. 11-13, *infra*, and her decision was upheld in *State Farm Mut. Auto. Ins. Co.* v. *Dole*, 802 F.2d at 487-489. The essential features of the rule have remained unchanged since 1984.[5]

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[3] Automatic seat belts close around the driver and a passenger when the door is closed or the engine is started. An airbag is a balloon-like device that inflates during a collision in order to help prevent an occupant from being thrown forward into the steering wheel, dashboard, or front windshield. Passive interiors are a potential protection system. They involve the use of additional padding in the dashboard, for example, and alterations in the steering column in order to protect occupants even without safety belts or airbags. *State Farm*, 802 F.2d at 476 n.1.

[4] In particular, the rule requires manufacturers to install a passive restraint system in 10% of passenger cars (except convertibles) built in the 1987 model year (between September 1, 1986, and August 31, 1987), 25% of the cars built in the 1988 model year, 40% in the 1989 model year, and all passengers cars manufactured after September 1, 1989. 49 Fed. Reg. 28,962, 28,999-29,000 (1984). The 1984 rule also provided auto makers with an incentive to install airbags because the Secretary determined that most manufacturers would install detachable passive seat belts and because she concluded that public acceptability concerns required that a variety of types of passive restraints be available. If a manufacturer included an airbag on the driver's side and any other passive restraint (*e.g.*, an automatic seat belt) on the passenger side, the manufacturer could count that one vehicle as 1.5 vehicles for the purpose of fulfilling the phase-in requirements.

[5] In 1985 and 1987, the Secretary adopted additional incentives for auto makers to install airbags to promote further the availability of consumer choice among alternative passive protection systems. See *Public Citizen* v. *Steed*, 851 F.2d 444, 446 (D.C. Cir. 1988) (describing the rules); *id.* at 447-450 (upholding the 1987 rule). The Secretary also recently announced a program of cooperative educational efforts to encourage greater use of existing protections and to foster public acceptance of passive restraints. 54 Fed. Reg. 8,046 (1989).

2. The question decided by the court below is whether a common law tort action seeking to hold a manufacturer liable for its failure to install an airbag in a vehicle is preempted by federal law. Two provisions of the Safety Act speak to that question. The first provision, Section 103(d), 15 U.S.C. 1392(d), is a preemption clause. It states that "[w]henever a Federal motor vehicle safety standard * * * is in effect, no State or political subdivision of a State shall have any authority * * * to establish * * * with respect to any motor vehicle * * * any safety standard applicable to the same aspect of performance of such vehicle * * * which is not identical to the Federal standard." That provision was designed to ensure that the Secretary could promulgate minimum safety standards that auto manufacturers could uniformly implement on a nationwide basis. H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966); S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966).

The second pertinent provision, Section 108(c), 15 U.S.C. 1397(k),[6] is a savings clause. It states that "[c]ompliance with any Federal motor vehicle safety standard * * * does not exempt any person from any liability under common law." This section was designed to preserve common law rights. H.R. Rep. No. 1776, *supra*, at 24; S. Rep. No. 1301, *supra*, at 12.

3. In 1981, petitioner Patricia Wood was riding without wearing a seatbelt in a 1976 Blazer, a multipurpose passenger vehicle (MPV) manufactured by respondent General Motors Corporation.[7] The Blazer left the road and collided with a tree, rendering Wood a quadriplegic. Petitioners thereafter filed this tort action against re-

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[6] The courts below cited the pre-1988 version of Title 15, which listed Section 108(c) as 15 U.S.C. 1397(c) (1982). The Safety Act was amended in 1988, and Section 108(c) was renumbered without change as 15 U.S.C. 1397(k) (1988). We will refer to the original sections of the Safety Act.

[7] An MPV is defined by NHTSA's regulations as "a motor vehicle with motive power, except a trailer, designed to carry 10 persons or less, which is constructed either on a truck chassis or with special features for occasional off-road operation." 49 C.F.R. 571.3.

spondent in federal district court in Massachusetts. Pet. App. 2a-3a, 71a-72a. When the Blazer was manufactured (and at present), vehicle manufacturers could comply with FMVSS 208 for MPVs by installing either a passive restraint system or manual lap and shoulder belts with a belt warning system. *Id.* at 9a-10a (citing regulations). The gravamen of petitioners' claims was that the Blazer was defectively designed because it was not equipped with a passive restraint system, such as an airbag.[8]

Respondent moved for summary judgment on the ground, inter alia, that Section 103(d) of the Safety Act, 15 U.S.C. 1392(d), and FMVSS 208 preempted petitioners' state tort law design defect claims. The district court denied respondent's summary judgment motion, holding that petitioners' tort claims were neither expressly nor impliedly preempted by federal law. Pet. App. 79a-93a. The court certified the preemption question for interlocutory appeal under 28 U.S.C. 1292(b), and the First Circuit agreed to decide "whether federal law preempts a state law product liability claim against a motor vehicle manufacturer based on its installing seat belts, rather than airbags, in a motor vehicle," Pet. App. 3a-4a.

On the merits, a divided court of appeals reversed the district court. Pet. App. 1a-54a. The majority concluded that design defect claims for not installing airbags in motor vehicles were neither expressly preempted by Section 103(d) nor expressly preserved by Section 108(c). Pet. App. 17a-27a. The majority reasoned that when the Safety Act was adopted in 1966, design defect claims were a nascent theory of liability, and Congress could not have foreseen that state common law tort actions against motor vehicle manufacturers preserved by Section 108(c) would have the practical effect of imposing on manufacturers the same type of state safety standards preempted

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[8] See Complaint para. 7.d, at 14 (filed Mar. 12, 1984) ("Defendant negligently failed to provide reasonably safe and adequate safety devices, which include but are not limited to 'air bag' devices, to protect passengers and minimize the seriousness of injuries in reasonably foreseeable circumstances which include collisions.").

by Section 103(d). The legislative history of the Act, the court noted, also confirmed that Congress was unaware of that possibility. Pet. App. 24a-27a. The court thus held that neither Section 103(d) nor Section 108(c) controls this case. Pet. App. 27a.

The majority then ruled that design defect claims are impliedly preempted by Section 103(d) because they "would stand as an obstacle to Congress's chosen *method* of increasing automobile safety," which was to grant DOT exclusive authority to set performance standards. Pet. App. 37a. Noting that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy," Pet. App. 32a (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)), and that the purpose of state law design defect actions was to "adapt[] standards of conduct" to "serve the needs of our society until the legislature imposes higher standards," Pet. App. 33a-34a (quoting *Smith* v. *Ariens*, 375 Mass. 620, 624-625, 377 N.E.2d 954, 957 (1978) (quoting *Larsen* v. *General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968))), the majority found that a compensatory damage award in a design defect action for not installing an airbag would regulate the conduct of vehicle manufacturers by requiring them to use airbags in their fleets. Pet. App. 32a-41a. Thus, holding a manufacturer liable for not installing airbags would "circumvent" Section 103(d) because it would be "tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area." Pet. App. 16a.[9]

Judge Selya dissented. Pet. App. 56a-65a. Although describing the question as "close[]," *id.* at 69a, Judge

[9] Later in its opinion, the majority explained that federal law preempted design defect claims only when two conditions were met. First, "the theory of recovery advanced by the product liability suit [must be] directed at the same 'aspect of performance' * * * as the federal safety standards." Pet. App. 50a. Second, "the theory of recovery [must be] of sufficiently general applicability that a successful tort suit would be equivalent to a state regulation." *Ibid.*

Selya concluded that Section 108(c) preserves design defect tort claims and that such claims do not disrupt the policy underlying the Safety Act, because manufacturers have the choice of redesigning their vehicles or paying tort awards. Pet. App. 56a-68a.

DISCUSSION

In our view, Section 103(d) of the Safety Act does not expressly or impliedly preempt design defect tort actions based on the claim that a vehicle was defective simply because it did not contain an airbag. We therefore disagree with the reasoning of the majority below, which concluded that Section 103(d) impliedly preempts such claims. At the same time, we believe that FMVSS 208 impliedly preempts tort claims that frustrate the Secretary's policy of encouraging vehicle manufacturers to offer the public a choice of *either* automatic seatbelts *or* airbag passive protection systems. Nonetheless, we do not believe that the judgment below warrants review by this Court. Although numerous federal and state courts have considered the preemption question, there is no conflict among the federal circuits or the state courts of last resort. In addition, this case does not present various other questions that must be addressed in order fully to resolve the preemption controversy. Moreover, under our analysis, FMVSS 208 would impliedly preempt state tort claims for cars now being manufactured. Under these circumstances, the petition should be denied.

1. In litigation on this question to date, both the parties and the courts have tended to take an all-or-nothing view of the preemption issue. The manufacturers have argued, and most courts have held, that Section 103(d) expressly or impliedly preempts any common law ruling imposing a standard of care greater than the standard set by federal law. The theory underlying this pro-preemption position is that holding manufacturers liable under standards developed at common law will lead to disuniformity in the standards applicable to manufacturers. In contrast to this sweepingly pro-preemption approach, plaintiffs have argued that common law tort

claims can never be expressly or impliedly preempted because Section 108(c) preserves all common law actions. Adherents to this equally adamant no-preemption approach are unmoved by the possible effects of common law liability on vehicle manufacturers' conduct (*e.g.*, driving them in the direction of all-airbags design).

We agree with neither approach. This Court has explained that when a federal regulatory scheme preserves a role for state law, "conflict preemption analysis must be applied sensitively * * * to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 109 S. Ct. 1262, 1276 (1989). Neither the manufacturers' position nor that of the plaintiffs' bar reflects the sensitivity to competing values that should carefully and fully be taken into account.

In our view, Section 103(d) does not preempt state tort claims on the ground that a judgment in a plaintiff's favor, reflecting a more stringent standard of care than that imposed by a federal standard, would put at risk the federal interest in uniformity. At the same time, Section 108(c) does not preserve state tort claims that put at risk a specific federal policy promoting motor vehicle safety. FMVSS 208 establishes just such an express federal safety policy of encouraging diversity in passive protection systems. Holding a motor vehicle manufacturer liable for failing to install one specific system—an airbag protection system—would conflict with that fundamental objective of FMVSS 208.

2. Federal law, including agency regulations, *City of New York* v. *FCC*, 486 U.S. 57 (1988); *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141 (1982), can expressly or impliedly supplant state law. *Schneidewind* v. *ANR Pipeline Co.*, 108 S. Ct. 1145, 1150-1151 (1988). At the most obvious level, Congress or an administrative agency acting within its delegated authority can preempt state law by so stating in express terms. *Ibid.* In addition, federal law impliedly preempts state law when (1) it is impossible to comply with both;

(2) the federal interest in the field is so dominant that federalism principles prevent enforcement of complementary or auxiliary state laws; (3) the federal regulatory scheme is so pervasive as to be exclusive; or (4) state law hinders the accomplishment and execution of the full purposes and objectives of federal law. *Ibid.*

We agree with the courts below that the Safety Act does not expressly preempt common law design defect claims. If Section 103(d) were the only relevant section, it could be read expressly to preempt state design defect tort actions that are tantamount to a direct state regulation.[10] But Section 103(d) does not stand alone; it must be read together with Section 108(c), which states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Section 108(c) thus preserves common law tort remedies in some, if not all, cases. The question is how to define that category.

The court of appeals excluded design defect tort claims from the scope of Section 108(c). It reasoned that, in 1966, Congress could not have foreseen that such claims would be permitted under state law, that holding manufacturers liable for not installing airbags would have the same practical effect as a law requiring airbags to be installed, and that such an outcome would disrupt the federal interest in having uniform standards. Pet. App. 19a-27a. In our view, that interpretation of Section 108(c) is mistaken.

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[10] Section 103(d) does not focus on the common law process, and was likely instead directed at the legislative process, since design defect actions were a novel liability theory when the Safety Act was adopted in 1966, as the court of appeals noted. Pet. App. 19a-24a. But that factor is not necessarily dispositive, because the Act forbids a State from "establish[ing]" or "continu[ing] in effect * * * any safety standard" different from an applicable federal performance standard, 15 U.S.C. 1392(c), and this Court has noted that in some cases tort liability can have the same effect and intent as direct regulation in the form of a statute. See *Garmon*, 359 U.S. at 246-247; *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 492-493, 498 n.19 (1987). See Pet. App. 32a-37a.

There is no reason to treat design defect claims differently from other tort claims. The text of Section 108(c) certainly does not do so. It preserves "any liability under common law" and therefore encompasses any tort theory, old or new. By its nature, the common law has always been a developing body of law. Congress obviously knew that in 1966. Moreover, design defect actions do not necessarily conflict with the purposes of the federal safety regulatory scheme. On the contrary, tort suits can complement federal regulations by supplying manufacturers with an additional incentive to design a safe product. Cf. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 186 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."). Accordingly, there is no reason not to read Section 108(c) generally to preserve all categories of tort claims, whether or not they were well known in 1966.

To be sure, interpreting Section 108(c) to preserve design defect tort claims creates tension within the Act. Allowing manufacturers to be held liable for design "defects" in vehicles that comply with federal standards can disserve Congress's interest in having uniform performance standards. But that tension stems from the fact that Sections 103(d) and 108(c) represent a compromise between the interests in uniformity and in permitting States to compensate accident victims. While a state legislature cannot direct manufacturers to comply with its own performance standards, a state court (absent a conflict with federal law or policies) can order a manufacturer to compensate accident victims for injuries caused by a defectively designed vehicle, even if the vehicle met all federal performance standards and even if such liability induces the manufacturer to redesign some or all of its cars. Whatever tension this creates is one that Congress decided to tolerate by enacting both Sections 103(d) and 108(c), and the courts must do so as well. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

3. For the reasons given above, we disagree with the court of appeals' holding that design defect claims are impliedly preempted by Section 103(d). If Section 108(c) preserves those actions, they do not conflict with "Congress's chosen *method* of increasing automobile safety," Pet. App. 37a, because that method includes common law liability for design defects. Holding manufacturers liable for defects in vehicles designed in compliance with federal standards would frustrate that method only if the Act bestowed on manufacturers an immunity from the incentives that the tort system can provide, and Section 108(c) disproves the existence of any such immunity.

At the same time, Section 108(c) does not preserve all design defect claims. The purpose of the Safety Act "is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. 1381, and the primary method that Congress chose to carry out that purpose was to empower the Secretary to issue motor vehicle performance standards, 15 U.S.C. 1392, 1397. In some cases, holding a manufacturer liable for a design defect could interfere with the Secretary's efforts to achieve the statutory objective. For example, if the Secretary determined that a particular item of equipment must have precise specifications in order to accommodate competing goals (*e.g.*, a headrest that is large enough to protect the driver, but not too large so as to obscure his view), a state court could not hold a manufacturer liable under a design defect theory on the ground that the device was too small (or too large) since the state standard would expressly conflict with federal requirements. Or, if the Secretary directed manufacturers to install only a *specific* passive protection system, a state court could not hold a manufacturer liable for not using a different system. State tort law would be preempted in such cases since it would be impossible to comply with both federal and state law. Cf. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963).

This case does not pose that type of conflict, but it does involve a closely related one. In issuing the current version of FMVSS 208, Secretary Dole rejected a proposal

that would have required airbags to be installed in all vehicles, in favor of a rule encouraging manufacturers to offer consumers a variety of passive protection systems. She determined—based on a very substantial history of consumer (and congressional) responses to passive restraint requirements—that diversity would promote motor vehicle safety by helping to ensure public acceptance of passive protection systems,[11] by encouraging the development of new and improved technologies,[12] and by enabling

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[11] In 1972, DOT adopted a rule requiring an interlock mechanism preventing engine ignition unless manual seat belts were fastened. That rule provoked a strong public reaction, prompting Congress to ban the interlock requirement and impose procedural limitations on DOT's future efforts to require restraints other than seat belts. Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482 (codified at 15 U.S.C. 1410b(b)). Given the public's adverse reaction to the interlock system, one factor the Secretary considered was the public's willingness to accept various passive restraint technologies. 49 Fed. Reg. at 28,987. See *Pacific Legal Foundation* v. *DOT*, 593 F.2d 1338, 1345-1346 (D.C. Cir.) (the Secretary must consider public reaction to safety standards in order to determine whether a particular standard is "practicable"), cert. denied, 444 U.S. 830 (1979). The Secretary found that some people were concerned about the operation of an airbag protection system, *i.e.*, some people feared that the chemical used to inflate airbags would be hazardous, that airbags would deploy inadvertently and thereby cause injury, or that airbags would not deploy during an accident. 49 Fed. Reg. at 29,001. The Secretary concluded that it would be easier to overcome these fears if airbags were not required in all vehicles. *Ibid.* Emphasizing the public's need "to become accustomed to the technology and the need for protection," Secretary Dole concluded that "an across-the-board mandate too quickly could engender adverse public reaction." *Id.* at 28,989. Given widespread public concern about the safety and efficacy of airbags, the Secretary concluded that "[i]f air bags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of air bags, * * * [including a possible] repeat of the interlock reaction." *Id.* at 29,001. See *id.* at 28,991-28,992.

[12] The Secretary determined that experience could show that automatic seatbelts would be used far more frequently than anticipated, and that manufacturers might be able to develop better and more acceptable automatic seatbelt systems. That development may result in automatic seat belts that were as effective at saving lives as airbags, but that did so at a lower cost. The Secretary also con-

the agency to acquire a more extensive data base upon which future regulatory decisions could be made. See 49 Fed. Reg. 28,962, 28,987-28,997, 29,000-29,001 (1984). The Secretary also concluded that an all-airbag requirement would be too costly for consumers, due to replacement costs, and that these cost considerations could lead consumers to decline to replace airbags after they were deployed, which could leave occupants without passive protection. *Id.* at 29,000-29,001.[13] For similar reasons, the Secretary took steps to ensure that manufacturers installed airbags in *some* of their cars. See page 3 notes 4-5, *supra.* Accordingly, a critical feature of FMVSS 208 is the Secretary's policy judgment that safety will best be promoted if manufacturers install *alternative* protection systems in their fleets, rather than one particular system in every vehicle.

That policy is likely to be frustrated if manufacturers are held liable for not installing airbags in their vehicles. The incentive effects of state tort law are likely to be particularly powerful in product liability cases involving deaths or serious injuries, where the damage awards are likely to be large. While we know of no cases that have gone to judgment involving alleged liability for not installing airbags, the damages awarded in other product liability cases against motor vehicle manufacturers have been substantial.[14] If manufacturers are held liable for

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cluded that an all-airbag requirement would unnecessarily stifle innovation in occupant protection systems. 49 Fed. Reg. at 29,001.

[13] The Secretary estimated that airbags themselves will cost $320 more per car than manual belts, and that they would increase fuel costs by $39 and insurance costs by $18 over the life of the car. The Secretary also estimated that the replacement cost for a deployed airbag would be $800, which may lead some persons not to have an airbag replaced. The Secretary found that automatic seatbelts, by contrast, would cost only $40, would increase fuel costs by only $11, and would have no post-deployment replacement cost. 49 Fed. Reg. at 28,991, 29,000-29,001.

[14] *E.g., Hall* v. *General Motors Corp.*, 647 F.2d 175 (D.C. Cir. 1980) (affirming judgment of $4.75 million); *Sumnicht* v. *Toyota Motor Sales, U.S.A., Inc.*, 121 Wis. 2d 338, 360 N.W.2d 2 (1984)

not installing airbags, the burden of paying sizeable compensatory and punitive damage awards along with "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, *supra*, at 12, is likely to lead auto makers to install airbags in all cars. That outcome would obviously eliminate the diversity that the Secretary found necessary to promote motor vehicle safety. At the least, holding manufacturers liable for not installing airbags would drastically "interfere[] with the methods by which [FMVSS 208] was designed to reach [its] goal." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987). Under these circumstances, design defect tort actions would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the agency]," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), and thus would be preempted by federal law. See *De la Cuesta*, 458 U.S. at 155-159 (regulations issued by the Federal Home Loan Bank Board permitting federal savings and loan associations to include due-on-sale clauses in mortgage contracts preempt contrary state law).

Respondent argues that FMVSS 208 preempts state tort claims because that standard has always allowed manufacturers to use various types of occupant restraints. Br. in Opp. 6-11, 19-20. We disagree with this reasoning. Nothing in the Safety Act or FMVSS 208 confers on car makers a "right" to comply with the federal standards without tort liability, and Section 108(c) proves that Congress did not grant any such immunity. That state tort law may compel an auto maker as a practical matter to choose one of the options authorized by federal law also does not necessarily establish an actual conflict between federal and state law. Federal standards are "minimum standard[s]," 15 U.S.C. 1391(2), permitting manufacturers to use any design that satisfies federal

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(same, $2.35 million); *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (Ct. App. 1981) (same, more than $6 million).

requirements. If any design "permitted" in this sense could not be the subject of a common law design defect claim, manufacturers would obtain by implication what Congress expressly denied them in Section 108(c): immunity from common law liability by complying with minimum federal standards. That result would be contrary to Congress's statutory design, which was to supplant direct state regulation of vehicle design, but to leave the common law intact absent an actual conflict with federal standards.[15] Thus, the mere fact that manufacturers may comply with federal law by installing one of several types of occupant restraint systems does not mean, standing alone, that a state law tort action seeking to impose liability for failing to install airbags is preempted.

What distinguishes this issue from most is that the Secretary determined not simply to allow either automatic belts or airbags, but that an all airbag rule would *disserve* the *safety* purposes of the Act. She therefore affirmatively sought to encourage manufacturers to use a *variety* of protection systems in their fleets. It is *that* policy of affirmatively encouraging diversity that would be disrupted by tort liability, which therefore would be preempted.[16]

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[15] DOT has long taken that view. In a January 1981 letter by Frank Berndt, Chief Counsel of NHTSA, written to counsel for one of the parties in *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981), DOT stated that, under Section 108(c), compliance with a federal standard is not a defense in a products liability action.

[16] Respondent errs in relying on 15 U.S.C. 1410b, Congress's response to the Secretary's 1972 ignition interlock proposal, as a basis for preemption. Br. in Opp. 5-6, 14-15, 20. Section 1410b required the Secretary to rescind the interlock rule and imposed additional procedural requirements on the Secretary's ability to issue regulations requiring occupant restraints other than seat belts. 15 U.S.C. 1410b(b)-(d). Section 1410b is irrelevant to this case for several reasons. First, it does not purport to modify either Section 103(d) or 108(c), the two sections at issue here. Second, Section 1410b purports to allow Congress to exercise a legislative veto over the Secretary's rule, but such provisions are now null and void. *INS* v. *Chadha*, 463 U.S. 919 (1983). In any event, the Secretary com-

Section 108(c) does not require a contrary result. The Court has repeatedly held that a clause preserving state tort remedies should not be interpreted in a manner that would lead the act to "destroy itself." *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). See also, *e.g.*, *Ouellette*, 479 U.S. at 494. Compare *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-300 (1976). The most analogous decision is *Chicago & N.W. Trans. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). In *Kalo Brick*, the Court held that a carrier could not be held liable under state tort law for abandoning a railroad line when the Interstate Commerce Commission had approved the carrier's application for abandonment and had considered the matters that the plaintiff sought to raise in state court. *Id.* at 325-327. The Court so held even though the Interstate Commerce Act had a savings clause similar to Section 108(c) of the Safety Act. 450 U.S. at 328. That clause, the Court held, did not allow a state court to second-guess the agency's judgment on matters committed to its discretion. *Id.* at 330. The same is true here. The task of issuing regulations that would implement the policies underlying the Safety Act was committed to the agency's care by that statute, cf. *City of New York* v. *FCC*, 486 U.S. at 63-64, and the state tort liability at issue here would disrupt the policy of encouraging diversity in passive protection systems. Section 108(c) does not preserve tort claims that would obstruct that or any other purpose of federal law.

4. Despite our disagreement with the approach to the preemption issue taken by the court of appeals, we nevertheless believe that review by this Court is not warranted. Like the First Circuit, the Tenth and Eleventh Circuits and three state appellate courts have ruled that federal law preempts a state law claim that a motor vehicle manufacturer can be liable for not installing an airbag. *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989),

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plied with Section 1410b when the 1977 version of FMVSS 208 was adopted, and Section 1410b does not apply to subsequent amendments to that standard. 15 U.S.C. 1410b(b)(3)(C).

petition for cert. pending, No. 89-852; *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), petition for cert. pending, No. 89-279; *Meier* v. *Nissan Motor Co.*, 212 Cal. App. 3d 980, 261 Cal. Rptr. 80 (Ct. App. 1989), petition for cert. pending, No. 89-940; *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), cert. denied, 108 S. Ct. 2905 (1988); *Gardner* v. *Honda Motor Co.*, 536 N.Y.S.2d 303 (App. Div. 1988), appeal dismissed, 543 N.Y.S.2d 401 (1989) (Table). One intermediate state appellate court has ruled to the contrary. *Gingold* v. *Audi-NSU-Auto Union, A.G.*, Nos. 2058 & 2059 (Pa. Super. Ct. Dec. 6, 1989).[17] That disagreement, however, is not so severe that review is warranted at this time.

Our preemption theory also may not lead to a result that differs from the one below. On the one hand, the

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[17] None of the cases cited in the petition conflicts with the decision in this case. As the First Circuit explained, Pet. App. 49a, those cases state only that compliance with a federal standard is not a defense to a tort suit. See *Shipp* v. *General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *Sours* v. *General Motors Corp.*, 717 F.2d 1511, 1517 (6th Cir. 1983); *Schwartz* v. *American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983); *Dawson*, 630 F.2d at 957-958; *Stonehocker* v. *General Motors Corp.*, 587 F.2d 151, 156-157 (4th Cir. 1978); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976) (dictum); *Larsen*, 391 F.2d at 506; *Volkswagen of America, Inc.* v. *Young*, 272 Md. 201, 321 A.2d 737, 746 (1974); *H.P. Hood & Sons., Inc.* v. *Ford Motor Co.*, 370 Mass. 69, 345 N.E. 683, 688 (1976). Compare *Fox* v. *Ford Motor Co.*, 575 F.2d 774, 778 (10th Cir. 1978) (court simply noted an admission by the defendant to this effect). None of those cases involved the question whether the Safety Act or FMVSS 208 preempted a tort claim. That issue, as the court of appeals explained, Pet. App. 50a, is quite different analytically, because only tort claims that are tantamount to a direct state regulation have the potential to disrupt federal policy.

The courts in *General Motors Corp.* v. *Edwards*, 482 So. 2d 1176, 1198 (Ala. 1985), and *Arbet* v. *Gussarson*, 66 Wis. 2d 551, 225 N.W.2d 431, 438 (1975), both used the term "preempt" in discussing the question whether compliance with a federal standard was a defense to a tort suit. But neither court discussed the preemption issue, and neither decision can be said to have passed on this question.

vehicle in this case, a 1976 Blazer, was designed and manufactured before the Secretary's 1984 rule was adopted. Moreover, FMVSS 208 does not require that MPVs like the Blazer have passive protection systems (although the Secretary has issued a notice of proposed rulemaking that would subject such vehicles to that requirement, see 55 Fed. Reg. 747 (1990)). Those circumstances could indicate that this particular action is not preempted.[18] On the other hand, a tort judgment that has the effect of inducing manufacturers to switch to an all-airbag fleet would stand as an obstacle to the fulfillment of FMVSS 208's policies, regardless of whether that judgment was entered in a case involving a 1976 or a 1990 vehicle, and regardless of whether that judgment involved a vehicle subject to the passive protection requirements of FMVSS 208. This Court's decision in *De la Cuesta* could suggest that the Secretary's rule should be given preemptive effect with respect to all vehicles, regardless of their date of manufacture.[19]

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[18] See *Kotler* v. *American Tobacco Co.*, 685 F. Supp. 15, 18 (D. Mass. 1988) (holding that the 1966 Federal Cigarette Labelling and Advertising Act preempts common law claims based on cigarette manufacturers' failures to provide warnings, but only for actions based on a failure to warn after 1966). See also *Hospital Employees Labor Program* v. *Ridgeway Hospital*, 570 F.2d 167 (7th Cir. 1978).

[19] *De la Cuesta* involved the issue whether a federal regulation authorizing banks to include due-on-sale clauses in loan agreements preempted state laws prohibiting such clauses. A subsidiary issue stemmed from the fact that two deeds in that case were signed years before the effective date of the federal regulation. 458 U.S. at 150 n.7, 170-171 n.24. This Court ruled that the regulation nonetheless applied to those documents since when they were executed state law appeared to allow due-on-sale clauses, a proposition reinforced by the later federal regulation, and the state courts did not announce the contrary rule until six years later. Because that state law rule, the Court held, was "pre-empted by a previously promulgated federal regulation," applying the Court's decision to the two deeds did not interfere with any "vested rights." *Id.* at 170-171 n.24. The reasoning in *De la Cuesta* is pertinent, because petitioners seek a new (and arguably novel) common law ruling in this case. Since there was no common law precedent in 1984 establishing a

Furthermore, adjudication of this case could require the Court to pass on difficult issues that have not been considered by the lower courts. One is whether the preemptive effect of FMVSS applies to vehicles that are manufactured after the 1984 rule was promulgated, or only after it went into effect (on September 1, 1986). Another is how vehicles should be treated if they were manufactured during the first three years of the phase-in period (1987-1989) when manufacturers had to install passive protection systems in only a percentage of their new cars. To our knowledge, no federal or state appellate court has considered any of these questions, and we believe it preferable that this Court not be the first to do so.[20]

Finally, FMVSS 208 requires that all passenger cars manufactured after September 1, 1989, have passive protection systems. Thus, although we would analyze the preemption question in a manner different from that followed by the court of appeals, the result would be the same for all passenger cars now being manufactured.

For these reasons, we believe that the Court should stay its hand and see whether a conflict on the preemption question hereafter develops among the federal courts of

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duty to install airbags in cars, application of the preemptive effect of the 1984 version of FMVSS 208 to vehicles designed and manufactured before 1984 would not upset a vested right of plaintiffs. As in *De la Cuesta*, one could view the ruling that petitioners seek, which would come in 1990 or later, as "pre-empted by a previously promulgated [*i.e.*, 1984] federal regulation."

[20] The decision below is also unsuitable for review for another reason. Petitioners' complaint alleged that respondent's vehicle was defectively designed because it did not have an adequate occupant protection system, such as an airbag. The question that the court of appeals addressed was whether federal law preempted a design defect claim based on the failure to install an airbag, instead of seatbelts. Pet. App. 3a-4a. The court of appeals' opinion, however, does not appear to distinguish between manual and automatic seatbelts. It therefore may be open to petitioners on remand to claim that the vehicle was defectively designed since it did not have automatic seatbelts. That possibility, coupled with the interlocutory posture of this case, militates against further review at this time.

appeals or the state courts of last resort. Even then, the Court may prefer to resolve a case that does not raise the other complex timing issues noted above, such as a case involving a car as to which the 1984 version of FMVSS 208 is applicable. At this point, we see no pressing need for the Court to consider these issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

DOUGLAS N. LETTER
JOHN F. DALY
Attorneys

PHILLIP D. BRADY
General Counsel

STEPHEN P. WOOD
Acting Chief Counsel

KENNETH N. WEINSTEIN
Assistant Chief Counsel
National Highway Traffic Safety Administration
Department of Transportation

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APPENDIX

RELEVANT STATUTORY PROVISIONS

1. Section 103(d) of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1392(d), provides that:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

2. Section 108(c) of the National Traffic and Motor Vehicle Act of 1966, 15 U.S.C. 1397(c) (1982), provides that:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.